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No. 85-186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,
v.
KENNETH A. HEROLD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER BURLINGTON NORTHERN, INC.

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REPLY BRIEF OF PETITIONER BURLINGTON NORTHERN, INC.

In its petition for certiorari, Burlington Northern, Inc. ("BN") demonstrated that the Eighth Circuit's unprecedented construction of the federal Boiler Inspection Act,[1] under which the Court imposed liability for removal of a nonessential safety device, would frustrate the purpose of that Act by creating a substantial new disincentive to voluntary efforts to improve railroad safety. BN also argued that the decision below exemplifies the growing confusion in the federal and state courts concerning the obligations of railroads to install and use equipment that

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[1] 45 U.S.C. § 23 (1982).

is not required by Federal Railroad Administration ("FRA") regulations. The importance of these issues is dramatically underscored by the brief *amicus curiae* filed by the Association of American Railroads ("AAR") in support of BN's petition.

The Opposition fails to respond to these serious issues. The respondents do not cite any authority whatsoever supporting the principle that liability can be imposed under the Boiler Inspection Act with respect to a non-essential device that is not in active use. Moreover, the Opposition does not deal with the counterproductive effect of the decision below on voluntary safety initiatives, nor attempt to reconcile the conflicting precedents on the effect of compliance with FRA equipment regulations. Instead, the respondents merely attempt to cloud these issues with a series of conclusory arguments that are both spurious and nonresponsive.

The respondents thus initially note that this case was submitted to the jury on multiple theories of negligence, implying that the verdict might be sustainable on alternative grounds, and that the case is therefore unworthy of this Court's attention.[2] It is settled law, however, that when multiple theories of liability are submitted to a jury, and any one of those theories is legally unsound, a general verdict such as the one rendered in this case cannot stand.[3] Moreover, the District Court's erroneous theory regarding the Boiler Inspection Act was the basis upon which it admitted a substantial amount of evidence, which the District Court itself recognized to be highly prejudicial.[4]

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[2] Brief in Opposition to Writ of Certiorari at 1 ("Opposition").

[3] *See, e.g., United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613, 619 (1959); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984); *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 26-27 (2d Cir. 1976).

[4] *See* BN's petition at 7-8 & n.16.

The respondents also repeatedly contend that the District Court found as a *fact* that the amber beacon involved in this case was an "appurtenance," and argue that this "factual finding" may not properly be disturbed by this Court.[5] This argument is simply unfounded. The facts determinative of whether or not the amber beacon involved in this case was an "appurtenance" were not in dispute. The legal consequences of these facts were, accordingly, a question of law for the Court,[6] which admitted the contested evidence and instructed the jury *as a matter of law* that the amber beacon was an "appurtenance" for purposes of the Boiler Inspection Act.[7]

The respondents have conspicuously failed to identify any precedent supporting the Eighth Circuit's decision. Both *Hines v. Smith*, 275 F. 766 (7th Cir. 1921), and *Green v. River Terminal Railway*, 585 F. Supp. 1019 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985), for example,[8] involved defective equipment that was actually *in use* on the locomotives.[9] Neither of these deci-

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[5] *See* Opposition at 3, 7 & n.10, 8.

[6] *Cf. Zollinger v. Pittsburgh & Lake Erie Railroad*, 337 F. Supp. 913 (W.D. Pa. 1972) (ruling on whether a device was an "appurtenance" for purposes of the Boiler Inspection Act viewed as "the law of the case"). It is well established that where the essential facts are not in dispute, the legal consequences of those facts are a question of law for the Court. *See Jopek v. New York Central Railroad*, 353 F.2d 778, 783-84 (3d Cir. 1965); *United States Gypsum Co. v. Schiavo Bros.*, 668 F.2d 172, 176 (3d Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *United States v. Seaboard Coast Line Railroad*, 368 F. Supp. 1079, 1082-83 (M.D. Fla. 1973).

[7] *See* appendix to BN's petition for certiorari at 44a ("App.").

[8] *See* Opposition at 6, 9-10.

[9] *See Hines v. Smith*, 275 F. at 769; *Green v. River Terminal Railway*, 585 F. Supp. at 1022. The respondents' contention that in *Hines*, "[l]iability was . . . based solely on the failure of the railroad to equip its locomotive with a workable automatic bell-ringer on the night in question," is simply erroneous. Opposition at 10. In fact, liability in the *Hines* case was based on the *use* of a defective bell ringer, which rang a few times when turned on

sions supports the Eighth Circuit's holding that the removal of a device that is not required by the Federal Railway Administration violates the Boiler Inspection Act.[10]

Although the Opposition attempts to draw support for the Eighth Circuit's position from *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the statement quoted from that decision does not pertain to the scope of liability under the Boiler Inspection Act at all, but instead pertains only to common law negligence.[11] Moreover, the quoted passage concludes only "that railroads have an ordinary duty of care to maintain properly all devices *actually attached* to a locomotive." [12] Since in the *Marshall* case there was "no allegation . . . that [the optional alerting lights] were attached to the locomotive at the time of the accident," the Ninth Circuit concluded that liability could not be imposed on the railroad even under this common law duty.[13] The

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(to warn the decedent and others that the locomotive was in motion), and then stopped. 275 F. at 769. It should be noted, moreover, that the *Hines* case antedated *Southern Railway v. Lunsford*, 297 U.S. 398 (1936), and is arguably inconsistent with that decision insofar as it held the bell ringer to be an "appurtenance" for purposes of the Boiler Inspection Act.

[10] As noted in BN's petition, both the legislative history of the Boiler Inspection Act and the cases decided under that statute clearly indicate that it was the *use* of dangerously defective equipment that Congress intended to proscribe, not the failure to use optional equipment. *See* BN's petition at 11-14. In addition, the AAR points out in its *amicus* brief that another court has recently rejected the conclusion that removal of optional safety equipment can give rise to liability in a related context. *Grothusen v. National Railroad Passenger Corp.*, 603 F. Supp. 486, 489 (E.D. Pa.) (no liability under the Safety Appliance Act for removal of optional safety equipment), *aff'd mem.*, 751 F.2d 376 (3d Cir. 1984).

[11] *See* Opposition at 9.

[12] *Marshall v. Burlington Northern, Inc.*, 720 F.2d at 1152 (emphasis added).

[13] *Id.*

Marshall decision thus clearly provides no support for the view that liability can be imposed on a railroad for a defective device that was *not* actually attached at the time of the accident.

Respondents' effort to reconcile the actual holding in *Marshall* with the decision in this case demonstrates in clear perspective how the Eighth Circuit's decision frustrates the purpose of the Boiler Inspection Act. If, as the respondents contend,[14] a railroad may not be held liable for failure to add a nonrequired device (under *Marshall*), but *is* liable if it *removes* such a device once attached (under *Herold*), the inevitable result is a disincentive to the use of any optional safety equipment.[15] As the *amicus* brief of the AAR illuminates, such a result is fundamentally inconsistent with the purpose of federal safety legislation, and with this Court's landmark decision in *Southern Railway v. Lunsford*, 297 U.S. 398, 402 (1936).[16]

Apparently recognizing this flaw in the Eighth Circuit's reasoning, the respondents disingenuously claim that BN removed only "the flashing light portion of the rotating beacon," [17] and that "the remainder of the amber beacon system"—the bracket used to clamp it to the locomotive, and the wiring between the locomotive's generator and the place where it was mounted—remained in

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[14] Opposition at 9.

[15] *See* Brief *Amicus Curiae* of the Association of American Railroads in Support of the Petition ("AAR Brief").

[16] The respondents never address the key point of the *Lunsford* case: that liability should not be imposed for the failure of a nonessential device that could enhance safety, but poses no inherent danger. *Southern Railway v. Lunsford*, 297 U.S. at 402. In referring to "integral or essential" parts, the *Lunsford* court was merely taking into account the obvious fact that some of the vital working parts of the locomotive—such as the engine—are not required by federal regulations. *See id.*

[17] Opposition at 2, 3, 6.

place.[18] The fact is, however, that the "flashing light portion" referred to by respondents *is* the beacon.[19] That was the understanding of the Eighth Circuit, and constituted the basis for its ruling that removal of such a device could create liability under the Boiler Inspection Act.[20]

As the Opposition demonstrates by its silence, the Eighth Circuit's expansive new interpretation of the Boiler Inspection Act is without support in the legislative history of the Act, in seventy years of case law applying it, or in the important public policies that underlie it.[21] It is, moreover, flatly inconsistent with recent precedent under the Safety Appliance Act,[22] and adds to the growing confusion in the federal and state courts regarding

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[18] *Id.* at 3; *see also id.* at 6. The Opposition states that the amber beacon is "wired directly to the locomotive headlight and, in fact, operates off the same power source as the headlight." *Id.* at 3. To set the record straight, however, it should be noted that expert testimony at trial indicated that the beacon is on a different circuit from the headlight, and that "[a]ll the electricity on [the locomotive] comes from one source." Testimony of Raymond Spannring, transcript at 853-54.

[19] Counsel for the respondents has previously recognized this fact, stating in both his opening statement and closing argument at trial that the amber beacon was not on the locomotive at the time of the accident. Trial transcript at 113-14, 2162. Similarly, the Opposition itself correctly refers to "the lack of an amber beacon on the lead locomotive." Opposition at 4. Respondents' current attempt to obscure this point is analogous to arguing that only "part" of a lamp has been removed from an office wall if the hooks on which it was hung, and the building's wiring to which it was connected, are left in place.

[20] *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1245, 1247 (8th Cir. 1985), App. at 6a, 10a.

[21] *See Southern Railway v. Lunsford*, 297 U.S. at 402.

[22] *See* note 10 *supra*. As noted in the AAR's brief, the Safety Appliance Act and Boiler Inspection Act are to be construed in *pari materia*. *See* AAR Brief at 14 n.20.

the obligation of railroads to utilize particular kinds of locomotive equipment not required by FRA regulations.[23]

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in BN's petition and in the brief *amicus curiae* of the AAR, the Court should grant BN's petition for certiorari or, in the alternative, summarily reverse the decision below.[24]

Respectfully submitted,

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[23] *See* BN's petition at 16-22.

[24] *See id.* at 23 n.48.